

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of Petition of)	
Continental Airlines, Inc. for a)	
Declaratory Ruling Regarding Whether)	
Certain Restrictions on Antenna)	ET Docket No. 05-247
Installation Are Permissible Under the)	
Commission's Over-The-Air Reception)	
Devices (OTARD) Rules)	
)	

**COMMENTS OF
T-MOBILE USA, INC.**

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Pursuant to 47 C.F.R. §§ 1.415 and 1.419, T-Mobile USA, Inc. ("T-Mobile") submits these comments in the above-captioned proceeding in which the Commission seeks views on a petition for declaratory ruling filed by Continental Airlines ("Continental").^{1/} The petition asks the Commission to declare that certain restrictions imposed by the Massachusetts Port Authority ("Massport") on the installation and use of fixed wireless antennas to create wireless local area

^{1/} See "Petition of Continental Airlines, Inc. for Declaratory Ruling," filed July 7, 2005 ("Continental Petition"); supplemented July 19, 2005 ("Supplemental Petition"). See also Public Notice, *OET Seeks Comment on Petition from Continental Airlines for Declaratory Ruling Regarding Whether Certain Restrictions on Antenna Installation Are Permissible under the Commission's Over-the-Air Reception Devices (OTARD) Rules*, DA No. 05-2213 (rel. July 29, 2005).

networks at Boston-Logan International Airport (“Logan Airport”) are prohibited under the Commission’s Over-the-Air Reception Devices (“OTARD”) rules.^{2/}

I. Introduction and Summary

T-Mobile is a rapidly growing nationwide wireless service provider, offering all-digital voice, messaging, and high-speed wireless data services. Based in Bellevue, Washington, the company has more than 25,000 employees serving over 20 million customers across the United States. A growing component of T-Mobile’s business is its HotSpot service, with which it provides Wi-Fi (802.11b) wireless broadband Internet access at more than 18,000 locations worldwide—6,300 of which are in the United States. Customers with a Wi-Fi-enabled laptop or PDA can access the network with flexible hourly, daily, monthly, or yearly payment options. Once they have logged on, HotSpot customers link to T-1 connections that support fast, easy access to corporate networks and painless downloading of large files. These connections are more secure than many local access networks. T-Mobile has deployed Wi-Fi Protected Access (“WPA”) with 802.1x security technology that provides an enhanced level of protection for wireless broadband traffic by encrypting the data traffic — including user names, passwords, and credit card information — when transmitted “over the air” from a user’s Wi-Fi device to T-Mobile’s installed access point. T-Mobile is the only carrier-provider that has deployed this enhanced security technology across its entire Wi-Fi network. T-Mobile also makes available to its customers for free the T-Mobile Connection Manager, which facilitates over-the-air encryption and verification of the legitimacy of the T-Mobile HotSpot to which the user is

^{2/} See 47 C.F.R. §§ 1.2 and 1.4000(e).

connecting. This is accomplished using Secure Socket Layer (“SSL”) technology that is the standard for data encryption and server-side authentication in secure Web-based transactions.

The number of T-Mobile HotSpot customers, the length of HotSpot sessions, and the amount of data transmitted over the T-Mobile HotSpot network all continue to experience dramatic growth. At a time of expanding use of Wi-Fi networks, Massport has attempted to curb and control Wi-Fi access at Logan Airport. Massport’s actions have caused predictable outcry from T-Mobile and Continental customers at Logan Airport; they are also contrary to federal law and policy. The Communications Act of 1934 clearly places jurisdiction over all issues related to radio frequency emissions within the Commission, preempting state and local regulation of these matters. The Commission’s OTARD rules permit any entity that has control or beneficial use of a property to institute Wi-Fi service by erecting a fixed wireless antenna, and those rules prohibit actions by landlords to impair the installation and use of such antennas. Massport’s anti-competitive, anti-consumer actions at Logan Airport are contrary to federal policy favoring rapid deployment of innovative wireless technologies and free consumer choice of telecommunications providers. If left unchecked, they will set a precedent with a significant negative impact on the valuable T-Mobile HotSpot service in airports and in other multi-tenant locations nationwide.

For the reasons discussed below, T-Mobile strongly supports Continental’s petition. While Massport attempts to characterize the issues before the Commission as a simple contract dispute between private parties,^{3/} Continental’s petition raises significant issues of federal law and policy that may be resolved only in this forum. T-Mobile urges the Commission unequivocally to declare that federal law preempts any efforts by airport authorities to prohibit or

^{3/} See “Motion for Extension of Time,” filed Aug. 16, 2005, at 2.

otherwise restrict the ability of airlines to install and utilize wireless antennas for the reception and transmission of fixed wireless signals for their own use, and use by their customers.

II. T-Mobile's Innovative and Valued HotSpot Service

A. An extensive, global Wi-Fi network

With over 6,300 nationwide HotSpots, T-Mobile offers the nation's largest carrier-owned Wi-Fi network. Globally, T-Mobile offers Wi-Fi service at over 18,000 locations. While T-Mobile's Wi-Fi service attracts a variety of subscribers, it is especially popular among business travelers, providing them with the ability to connect with corporate networks and conduct business from remote locations across the nation and the globe. A key to this global network is the presence of HotSpots in airports and airline clubs. Currently, T-Mobile provides Wi-Fi service in the entirety of eight domestic airports, namely, Austin-Bergstrom International Airport, Burbank-Glendale-Pasadena Airport, Dallas-Forth Worth International Airport, Knoxville-McGhee Tyson Airport, Providence-T.F. Green International Airport, San Francisco International Airport, Dallas Love Field, and Sioux Falls Regional Airport. Pursuant to exclusive agreements with airline partners, T-Mobile HotSpots are also accessible in 29 American Airlines Admirals Clubs, 37 Delta Air Lines Crown Room Clubs, 32 United Airlines Red Carpet Clubs, and 12 US Airways Clubs. In addition, T-Mobile's HotSpot subscribers are able to obtain Wi-Fi service in airports and rail stations elsewhere in North America, as well as in Europe and Asia.

But T-Mobile HotSpots are not limited to travel hubs. Subscribers can log on globally in thousands of locations at Starbucks, Borders Books & Music, FedEx Kinkos, Hyatt Hotels, and Red Roof Inns. At all of these HotSpots, service is available at flexible yearly, monthly, daily, or hourly rates. An occasional user, therefore, can log on for a few hours in Starbucks on a

Saturday afternoon as easily as a business traveler can stay connected while traveling from Knoxville, through Denver, to Tokyo, and at hotels and coffee shops along the way.

B. Fast, convenient, and more secure Wi-Fi service

All T-Mobile HotSpots are supported by a full T1 connection, which makes possible the transmission of information at robust broadband speeds. Such fast transmission speeds allow subscribers quickly to download large files, such as documents in PDF format or containing large graphics or charts, and also facilitate easy access to corporate intranet applications that transmit large amounts of information in short periods of time. As the Commission knows, in today's corporate world, the use of virtual private networks ("VPN") and powerful firewalls facilitate almost limitless access to internal corporate networks from anywhere in the country and the world. Unlike some Wi-Fi services, T-Mobile's HotSpot network provides convenient access to these VPNs and internal corporate networks, a vital need for many modern businesspersons. T-Mobile HotSpots, therefore, have become invaluable to subscribers who must remain in contact with colleagues and have access to documents while traveling.

T-Mobile's is the only nationwide Wi-Fi network to employ 802.1x security enhancement. T-Mobile also provides on a complimentary basis to all HotSpot customers its proprietary Connection Manager, which provides a more secure authentication process by encrypting the customer's username and password. Once authenticated and authorized, WPA with 802.1x encrypts all of the customer's data traffic transmitted wirelessly from the Wi-Fi device to the T-Mobile access point. This encryption helps protect against unauthorized interception of a customer's data while it is transmitted "over the air" and helps to prevent session hijacking. Significantly, these encryption and security features are not available for users of AWG's Wi-Fi network at Logan Airport.

C. As confidence in Wi-Fi service has grown, so has T-Mobile's customer base

According to Julie Ask, lead wireless analyst at Jupiter Research, "[Wi-Fi] awareness is up, there are more devices out there; the setup has become easier; and more people are comfortable with the security."^{4/} This increased awareness and comfort is translating into growing use of T-Mobile's HotSpot service. Since the launch of T-Mobile HotSpots in 2002, over 15 million customers have initiated sessions, with 8 million of those sessions occurring last year and a full 3 million of them occurring in a 90-day window this spring. The length of those sessions is growing as well: in 2003, the average session lasted 23 minutes; in 2004, the average session lasted 45 minutes; and, by August 2005, the average session lasted 67 minutes. As of June 13, 2005, T-Mobile HotSpot served more than 450,000 unique customers who had paid for service in the previous 90 days. These proceedings, therefore, come at a time when the public has embraced the value of Wi-Fi and of T-Mobile's global HotSpot network in particular.

III. T-Mobile HotSpot's Experience at Logan Airport

In 1998, T-Mobile contracted with American Airlines to provide Wi-Fi service at all American gates and in all Admirals Clubs.^{5/} Pursuant to this agreement, T-Mobile installed Wi-Fi service in Logan Airport's Admirals Clubs in 1999. T-Mobile's HotSpot service had been operational in these clubs for over five years when Massport ordered American and T-Mobile to

^{4/} Tricia Duryee, *T-Mobile to Boost its Wi-Fi "Hotspots,"* SEATTLE TIMES, June 11, 2005.

^{5/} The parties to the 1998 agreement were MobileStar and American Airlines. MobileStar then entered bankruptcy proceedings, and VoiceStream purchased its assets in January 2002. In 2001, VoiceStream had been purchased by Deutsche Telekom, and in September 2002, Deutsche Telekom transitioned the VoiceStream brand name for the United States to T-Mobile. T-Mobile, therefore, succeeded MobileStar in its contract with American Airlines. A new contract between T-Mobile and American Airlines, as well as Delta Air Lines and United Airlines, governing provision of T-Mobile HotSpot service at domestic airports was signed in October 2002.

shut down the HotSpot service in April of this year. Pursuant to T-Mobile's exclusive contract with Delta Air Lines, T-Mobile was scheduled to begin providing HotSpot service at Delta's two new Crown Club Rooms this spring. However, Massport refused to approve such deployment, insisting that the AWG network was the only Wi-Fi permitted to operate in the airline clubs.

Massport's attempt to monopolize Wi-Fi revenues at Logan Airport, effected through its shut-down of T-Mobile HotSpots and Wi-Fi service to Continental's frequent flyers, has generated a chorus of criticism.^{6/} T-Mobile HotSpot subscribers, accustomed to logging on seamlessly in airports across the country, now face additional fees for Wi-Fi access at Logan Airport and cannot obtain the valuable features of T-Mobile's service. Angus Davis, who is a technology company cofounder, frequent business traveler, and T-Mobile HotSpot subscriber, summarized the feelings of many of these customers in response to questions from the *Boston Globe*: "I was outraged," he said.^{7/} Alan Gold, another business traveler, was mystified by Massport's conduct: "This hasn't come up as an issue at any other airport."^{8/} These sentiments are echoed in the comments filed in these proceedings by Continental frequent flyers and T-Mobile HotSpot subscribers.

^{6/} See Peter J. Howe, *Massport Criticized for WiFi Shutdowns*, BOSTON GLOBE, Aug. 10, 2005 ("Boston's Logan International Airport is facing growing complaints that it's trying to impose a 'WiFi monopoly' at the airport.").

^{7/} *Id.*

^{8/} *Id.*

IV. Massport's Restrictions on Carriers' Use of Wi-Fi Technologies Are Contrary to Federal Law

A. Resolution of this dispute is within the Commission's exclusive jurisdiction

The Commission's authority to grant Continental's petition and declare Massport's actions a clear violation of the Commission's rules cannot be questioned. The Communications Act of 1934, as amended, ("the Act") grants the Commission the exclusive authority to regulate all issues relating to radio frequency emissions. Congress's manifest intent to give the Commission such exclusive jurisdiction is evidenced in numerous provisions of the Act, including, in particular, sections 2, 301, 302, and 303(c) - (f). Section 302a of the Act reserves for the Commission the authority to "make reasonable regulations ... governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation, conduction, or other means in sufficient degree to cause harmful interference to radio communications."^{9/} Further, section 301 of the Act holds that "[i]t is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission."^{10/} As the Commission has made clear, together these sections of the Act "comprehensively regulate[] interference, [and therefore] Congress undoubtedly intended federal regulation to completely occupy that field to the exclusion of local and state governments."^{11/} The Commission and the courts have repeatedly affirmed this holding.^{12/} Accordingly, the

^{9/} See 47 U.S.C. § 302a.

^{10/} See 47 U.S.C. § 301.

^{11/} Memorandum Opinion and Declaratory Ruling, *In the Matter of 960 Radio, Inc.*, Petition for Declaratory Ruling, FCC 85-578, 1985 WL 193883, at *2 (F.C.C. Nov. 4, 1985). As the Supreme Court has held, Congress's preemption power reaches both state and local ordinances. See *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604-605 (1991).

Commission's radio frequency rules preempt any attempt by a state or local government — including an airport authority^{13/} — to restrict or regulate the transmission of radio frequencies, including, without doubt, any direct or indirect restrictions on the operation of Wi-Fi hotspots.

It is equally clear that the Commission's plenary authority to regulate radio frequency emissions encompasses the ability to resolve disputes related to the use of unlicensed wireless devices, including Wi-Fi antennas, in multi-tenant environments. Indeed, just over one year ago, the Commission's Office of Engineering and Technology ("OET") reaffirmed the Commission's exclusive authority to resolve "matters involving radio frequency interference when unlicensed devices are being used."^{14/} At the same time, OET also clarified that the OTARD rules^{15/} apply to the "operation of unlicensed equipment, such as Wi-Fi access points" to the same extent as

^{12/} See e.g., *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 320 (2nd Cir. 2000); *Southwestern Bell Wireless Inc. v. Johnson County Bd. of County Comm'rs*, 199 F.3d 1185, 1190 (10th Cir. 1999); see also *Fidelity Savs. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (holding that federal regulations have the same preemptive force as federal statutes).

^{13/} It has long been established that airport authorities, which are creations of local or state legislatures, are to be treated as governmental entities. See, e.g., *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 825 F.2d 367, 369 (11th Cir. 1987) (An airport agency that owns and operates an airport "[i]s a local governmental agency created by the Florida legislature."); *Capital Leasing of Ohio, Inc. v. Columbus Mun. Airport Auth.*, 13 F. Supp. 2d 640, 643 (S.D. Ohio 1998) (An airport authority "is a governmental entity created ... by the City of Columbus, pursuant to the laws of Ohio."). Massport's attempts to restrict the airlines' installation and use of fixed wireless antennas thus should be treated as acts of a local governmental entity.

^{14/} See Public Notice, *Commission Staff Clarifies FCC's Role Regarding Radio Interference Matters and Its Rules Governing Customer Antennas and Other Unlicensed Equipment*, Public Notice, 19 F.C.C.R. 11300 (June 24, 2004) at 1 ("[W]e reaffirm that, under the Communications Act, the FCC has exclusive authority to resolve matters involving radio frequency interference ... when unlicensed devices are being used, *regardless of venue*." (emphasis added) ("June 24th Public Notice").

^{15/} See 47 C.F.R. §§ 1.4000(a) *et seq.*

any other fixed wireless service.^{16/} Finally, OET made clear that this authority extended to all “multi-tenant environments (MTEs),” *including* airports.^{17/}

The need for the Commission’s clear authority in this context is obvious. Under the Commission’s leadership, Wi-Fi has thrived and consumer access to advanced wireless service has greatly expanded. This progress would certainly be hampered and possibly reversed if each airport authority in the United States, and by natural extension, each multi-tenant landlord were permitted to exercise plenary authority over Wi-Fi throughout the property under its management.

B. Massport’s actions clearly violate the Commission’s OTARD rules

The Commission’s OTARD rules, which generally prohibit any non-FCC-imposed restrictions on the ability to receive or transmit fixed wireless communications signals, were adopted in furtherance of the Commission’s goal of enhancing competition and ensuring consumer choice among different telecommunications providers.^{18/} Unambiguously, the OTARD rules (1) permit any entity that has control or beneficial use of the property in question to institute Wi-Fi service by erecting a fixed wireless antenna, and (2) expressly prohibit actions by landlords to impair the installation and use of such antennas.^{19/} Specifically, the rules provide

^{16/} June 24th Public Notice at 1.

^{17/} *Id.* at 2 (“MT environments encompass venues such as hotels, conference and convention centers, *airports*, and colleges and universities.”) (emphasis added).

^{18/} See First Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order, CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order, CC Docket No. 88-57, *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983, 22986 ¶ 3 (2000).

^{19/} See 47 C.F.R. § 1.4000(a)(1).

that “[a]ny restriction, *including ... any ... lease provision ... or similar restriction*, on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property that impairs the installation, maintenance, or use of an antenna that is ... [u]sed ... to receive or transmit fixed wireless signals other than via satellite, and that is one meter or less in diameter or diagonal measurement ... is prohibited to the extent it so impairs[.]”^{20/}

Massport’s violation of the OTARD rules here is patent. To start, Continental installed its Wi-Fi antenna in its frequent flyer lounge at Logan Airport — a space that is located within Continental’s area of use or control under the terms of the May 5, 2003, Lease Agreement between Continental and Massport.^{21/} Furthermore, Continental uses the antenna at issue to receive and transmit fixed wireless signals other than via a satellite, and the antenna is a “device less than 1 meter in size.”^{22/} Finally, Massport’s ongoing efforts to prohibit Continental’s use of its antenna to provide Wi-Fi services within the areas encompassed by its lease clearly “impair” Continental’s use of the fixed wireless antenna, precisely in the manner prohibited under the rule.^{23/}

The OTARD rules make very limited exceptions to the prohibition against landlord-imposed restrictions on tenants’ use of fixed wireless antennas, none of which are implicated here. Under the rules, a landlord may restrict the installation and use of antennas to receive or transmit fixed wireless signals only where the restriction is “necessary to accomplish a clearly

^{20/} 47 C.F.R. §§ 1.4000(a)(1)(ii)(A), (B) (emphasis added).

^{21/} See Continental Petition, Exhibit B; *see also*, Continental Supplement ¶ 7.

^{22/} See Continental Supplement ¶ 3.

^{23/} See 47 C.F.R. § 1.4000(a)(3)(i).

defined, legitimate safety objective that is either stated in the text, preamble, or legislative history of the restriction or described as applying to that restriction in a document that is readily available to antenna users.^{24/} In addition, any such restriction must be applied “in a non-discriminatory manner to other appurtenances, devices, or fixtures that are comparable in size and weight and pose a similar or greater safety risk as these antennas and to which [the challenged] regulation would normally apply,” and must be “no more burdensome to affected antenna users than is necessary to achieve” the corresponding public safety objectives.^{25/}

Massport did not assert any public safety rationale in its initial attempts to prohibit Continental’s provision of Wi-Fi services in the areas encompassed by Continental’s lease.^{26/} Only in later communications with Continental did Massport allude to a public safety justification for its actions. Specifically, Massport suggested that the prohibition is necessary (1) because of an (unspecified and unsubstantiated) “potential threat to public safety caused by Continental’s unauthorized and unlawful wireless communications,” and (2) because Continental’s Wi-Fi system “presents an unacceptable potential risk” to wireless systems operating in areas adjacent to Continental’s customer lounge.^{27/} At no time, however, has Massport provided any concrete basis for these assertions. As a result, Massport clearly has not established that the restrictions it seeks to impose on Continental’s use of its already-installed

^{24/} See 47 C.F.R. § 1.4000(b)(1).

^{25/} See 47 C.F.R. § 1.4000(b)(1), (3).

^{26/} See Continental Petition at Exhibit A.

^{27/} *Id.* at Exhibit C p. 2.

Wi-Fi antenna are by any means “necessary to accomplish a clearly defined, legitimate safety objective” as required under the OTARD rules.^{28/}

V. Validating Massport’s Prohibition on Carriers’ Use of Wi-Fi Technologies Would Be Contrary to Federal Policy and Create a Dangerous Precedent

A. Massport’s actions frustrate deployment of innovative wireless technologies

The restrictions that Massport is attempting to impose not only are preempted by federal law, but are plainly incompatible with the laudable federal policy goal of facilitating the development and deployment of advanced wireless technologies for the benefit of all Americans. As Congress has made clear and the Commission repeatedly has recognized, one of the chief goals of federal communications policy is to “make available, so far as possible, to all people of the United States, . . . a rapid, efficient, Nation-wide, and world-wide, wire and radio communications service with adequate facilities at reasonable charges.”^{29/} As detailed above, Massport’s dealings with T-Mobile (and as described in its petition, with Continental^{30/}) have been contradictory, heavy-handed, and contrary to the interests of carriers and traveling consumers, particularly business travelers for whom T-Mobile HotSpots provide an innovative,

^{28/} T-Mobile believes that it is highly unlikely that Massport could ever establish a compelling public safety rationale to justify the outright ban on Continental and other airlines’ use of Wi-Fi systems at Logan Airport. As an initial matter, the unlicensed spectrum used to support Continental’s and other airlines’ Wi-Fi systems is not the same or even adjacent to that being used by public safety personnel at Logan Airport, since such personnel undoubtedly rely on the spectrum frequencies that the FCC has allocated specifically for use by public safety personnel. Moreover, to date, there is no evidence that any public safety officials at Logan Airport have informed Continental of any interference to their wireless systems resulting from Continental’s Wi-Fi operations. T-Mobile knows of no public safety problems related to its five-year provision of Wi-Fi service in Logan Airport’s Admirals Clubs.

^{29/} Order on Reconsideration, *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, 19 FCC Rcd 5637, 5640 (2004).

^{30/} See Continental Petition at 1-4.

efficient, and increasingly indispensable service. Massport's efforts to increase its revenues by monopolizing the use of Wi-Fi technology at Logan Airport have denied countless businesses and consumers access to the sort of secure, efficient, and reasonably priced wireless communications services that the Commission is charged with facilitating. If allowed to continue, these restrictions would set a dangerous precedent of elevating the financial interests of one group above those of all the intended beneficiaries of the Commission's mandate to promote the deployment of advanced wireless services.

B. Massport is attempting to make Logan Airport a competition-free zone

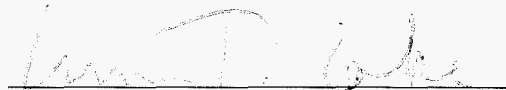
Massport's restrictions on airline carriers' ability to employ Wi-Fi technologies to meet their own and their customers' needs also threatens the vital federal policy goal of facilitating "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies[.]"^{31/} Based on this congressional directive, the Commission has promulgated myriad policies that promote competition and consumer choice among telecommunications providers. As is clear from Continental's petition and T-Mobile's experience, Massport has sought completely to eliminate competition for Wi-Fi access at Logan Airport in the interest of increasing its own revenues. Allowing Massport to establish such an unwarranted monopoly thus runs directly counter to congressional intent and the Commission's longstanding policy of ensuring competition among service providers for the benefit of consumers. The Commission's failure affirmatively to declare Massport's actions unlawful would validate this anticompetitive behavior, and it would set a precedent that airport authorities — and other landlords — would likely follow.

^{31/} S. Rep. No. 104-230, at 1 (1996) (Conf. Rep.).

Conclusion

The Commission should grant Continental's petition for a declaratory ruling and unequivocally declare that Massport's limitations on deployment of Wi-Fi networks by airlines and by T-Mobile clearly violate the Commission's rules and thus are unlawful.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "William T. Lake", is written over a horizontal line.

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